



# Employment Law Updates 2025



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# Key Issues

- I-9 / E-Verify compliance
- EEOC priorities
- D&I
- Pregnancy rights
- Labor / union activities

# I-9/E-Verify Compliance

## I-9 / E-Verify Compliance

- Subset of broader immigration compliance
- Unlawful to knowingly hire/employ a person not authorized to work in the U.S.
  - Includes both “actual” and “constructive” knowledge
  - And, “constructive” knowledge can include failing to complete or not properly completing I-9s

# I-9 / E-Verify Compliance

- Consider:
  - Internal I-9 / E-Verify compliance audit (ideally under privilege)
    - Must be prepared to deal with results
  - Training for personnel responsible for I-9 and E-Verify completion
  - Protocol for response to requests from government agencies or requests for access to worksite, records, personnel

## I-9 / E-Verify Compliance

- Proactive approach (vs. “head in the sand”) mitigates risk
- And, remember - always a key issue in mergers and acquisitions (especially now)

# I-9 Training

- It's not “just paperwork”
- Train HR/applicable staff on proper I-9 completion and compliance:
  - Don't request specific documentation
  - Complete the form timely
  - Keep the forms separate & accessible
  - NEVER backdate
  - Ensure legible
  - Only re-verify if necessary

# I-9 Training

- Failure to train:
  - May be deemed “bad faith” on part of employer
  - May cause technical violations to be converted to substantive violations

# Common Form I-9 Issues

- Completion on an expired I-9 form
  - CHECK to make sure using current form
- Omitting required information (birthdate, address, full name, document numbers or expiration dates)
- Sections 1 or 2 not signed/completed within the required timeframe
  - Remember - Section 1 by or on first day of work; Section 2 within 3 business days of first day of work

## Common Form I-9 Issues (cont.)

- Incomplete acceptable document information (or in the alternative, more documents than necessary to satisfy the I-9 requirements are provided)
- Invalid or expired documents accepted
- Completion on a Spanish form for an employer not located in Puerto Rico
  - Only employers in Puerto Rico may complete the Spanish-language version (but any employer may use as a translation tool)

# Common E-Verify Issues

- Selecting incorrect List B document from drop-down
- Accepting restricted Social Security card
- Not ensuring List B document has a photo
- Creating duplicate cases for same employee without reason
- Creating case after third business day following first day of work
- Creating cases for employees hired before employer signed up for E-Verify

## Common E-Verify Issues (cont.)

- Failing to download Further Action Notices and provide to employees
- Having tentative nonconfirmation cases (TNC) open for more than 10 federal government working days following mismatch
- Taking premature action against or terminating employees who receive a mismatch
- Failing to close open cases with final case results

# Penalties

- Paperwork violations - \$288 to \$2,861 per violation
  - Substantive (examples: missing I-9; completing late; missing name; no signatures; unacceptable documents recorded; Supplement B issues)
  - Technical (examples: missing birthdate; missing employee or employer address; missing date of hire; missing company rep title, company name, or address; failing to complete preparer/translator certification)

## Penalties (cont.)

- Five factors considered in determining total civil penalty amount:
  1. Size of the business
  2. Good faith of the employer
  3. Seriousness of the violations
  4. Involvement of unauthorized workers
  5. History of previous violations

# Internal Audits

- Employers may conduct internal audits of I-9s to ensure ongoing compliance
- Key preliminary questions:
  - Why are we doing this?
  - Should we do this ourselves?
  - Do we know what we are doing?
  - Are we prepared to deal with the results?

## Internal Audits (cont.)

- Options:
  - Using internal resources
  - Third-party vendor (directly or under direction of outside counsel)
  - Outside counsel
- Carefully consider benefits of attorney-client privilege
- Carefully vet vendors and outside counsel

## Internal Audits (cont.)

- FOLLOW strict USCIS guidance - <https://www.uscis.gov/i-9-central/completing-form-i-9/self-audits-and-correcting-mistakes>
- Can review all I-9s or a sample (provided the sample is selected based on neutral and non-discriminatory criteria)
- Communicate to employees before and during the audit in a transparent manner
- If discover errors - draw line through incorrect info + enter correction + initial and date (do not conceal original entries)
  - Section 1 - employee must correct
  - Section 2 - employer must correct

# Mergers and Acquisitions

- If selling/merging, expect that potential buyers/parties will do diligence on I-9/E-Verify compliance
  - Noncompliance can affect deal value and result in special ongoing indemnity obligations
- If buying, buyer and its lawyers should carefully explore seller's compliance

## Mergers and Acquisitions (cont.)

- Employers who have acquired another company or have merged with another company may choose to treat employees who are continuing their employment with the related, successor, or reorganized employer as:
  - New hires (employers must complete a **new I-9**)
  - Continuing in employment (employers must obtain and maintain the previously completed I-9)

## Mergers and Acquisitions (cont.)

- If treating as new hires, must complete new I-9s for all
  - Enter the effective date of sale as the employee's first day of employment
  - Must plan ahead for flurry of I-9/E-Verify activity immediately after closing
- If treating as continuing in employment, must obtain and maintain the previously completed I-9
  - Take them with all of their “warts” - liable for any errors or omissions on the previously completed I-9

# EEOC Update

## EEOC Priorities (straight from EEOC)

- “Rooting out unlawful DEI-motivated race and sex discrimination”
- “Protecting American workers from anti-American national origin discrimination”
- “Defending the biological and binary reality of sex and related rights, including women’s rights to single-sex spaces at work”

## EEOC Priorities (straight from EEOC)

- “Protecting workers from religious bias and harassment, including antisemitism”
- “Remedying other areas of recent under-enforcement”

# EEOC Priorities

- This likely means an increase in focus on and investigation into allegations of:
  - “Reverse” discrimination (race/national origin)
  - Religious discrimination and denial of religious accommodation
  - Effects of DEI programs in the private sector workplace

# D&I in the Workplace

## D&I in the workplace

- Addressed in various executive orders impacting federal contractors, federal grant recipients and private sector employers
- Focus on elimination of “illegal” DEI programs and federal contractor affirmative action requirements for women and minorities

# D&I in the workplace

- Fundamentally, law is unchanged
- But, increased scrutiny on:
  - Mandatory diverse slate policies
  - Using “race by proxy” data
  - Programs promoting “equity” vs. “equality”
  - Efforts to “rebalance” workforces
  - Diversity “goals” or “targets”
  - Diversity-based compensation initiatives

# D&I in the workplace

- Recommendations
  - Review existing programs, with focus on:
    - Quotas, preferences, plus factors, set asides for any group
    - Comp and incentives (or penalties) tied to diversity metrics or D&I goals
    - Diverse candidate slate or hiring panel requirements
    - Closed groups/programs where members need to identify with or be member of a protected class or share protected characteristic (affinity/resource groups, mentorship/leadership development programs)
    - D&I training material content

## Recommendations (cont.)

- Review all public/internal materials and messaging:
  - Many challenges to D&I programs rely on publicly available information such as company websites, SEC filings, tweets, internal reports, etc.
  - Internal and external messaging surrounding D&I have been cited as evidence of allegedly discriminatory hiring and other employment practices.
- Commence training for HR, D&I professionals, and leadership focusing on distinguishing legal and illegal D&I activities:
  - Many D&I activities are neither clearly legal/illegal. It is important that relevant stakeholders are aware of the margins to make informed decisions based on the company's risk tolerance.
  - Consider designating one or more employees who are responsible for tracking updates related to the enforcement of federal anti-discrimination laws.

## Recommendations (cont.)

- Take employee complaints or objections related to D&I activities, programs, and trainings seriously.
  - Consideration should be given to allowing employees to opt out, where appropriate.
- Emphasize the company's commitment to EEO and non-discrimination:
  - By way of example, references to "equity" have been construed as running afoul of *equal* opportunity.
  - Companies should also continue to ensure that all employment decisions are based on hiring, promoting, and retaining the best, most qualified person for the role without regard to protected characteristics.

# Considerations for Gov't Contractors

- Review all existing state and federal contracts to determine what, if any, obligations the company has related to D&I:
  - This review should identify areas where contractual obligations (such as those imposed by Federal Acquisition Regulation ("FAR") clauses, collective bargaining agreements, or state or local affirmative action laws) contradict the terms of the Executive Order or stated positions of the Administration.
- Establish ongoing contact with the company's contracting officers:
  - Employers should stay in regular contact with their contracting officers to understand their evolving FAR and compliance obligations under any existing contracts.

## Considerations for Contractors (cont.)

- Review all affirmative action activities, related policies, and forms to ensure compliance with EO 14173:
  - Ideally, this review is conducted by legal counsel under privilege. As part of this review, federal contractors should review EEO/AA policy statements and tag-lines, invitations to self-identify, and contracts with EO clause provisions and remove all references to federal affirmative action.
- Modify non-compliant activities, programs, policies, and contracts:
  - Federal contractors are clear targets for future investigations and litigation related to their D&I programs and activities. Where possible, modifications to any existing activities, programs, policies, contracts, and grants should be done in coordination with legal counsel.

# Risk Mitigation

- Ideal programs in the employment context are policies and practices aimed at ensuring equal opportunities and outreach.
  - NOT “affirmative action.”
  - NOT making decisions based on protected class status.
- Can still have diversity, inclusion, belonging, and accessibility policies and a culture grounded in these values.

## Risk Mitigation (cont.)

- Programs might include:
  - Outreach to diversity-focused recruitment sources to identify a strong pipeline of diverse talent.
  - Non-exclusive mentoring programs aimed at supporting diverse talent within a company (beware of exclusive accelerated development programs).
  - Skills-based training to develop employee skills to be better qualified to move into other roles.
  - Having other policies and practices to champion and promote diversity within the workforce, such as affinity groups and awareness events (open to all).

## Risk Mitigation (cont.)

- Programs cannot include:
  - Using protected categories, such as race, to decide who to hire or promote.
  - Setting aside positions to be filled by a woman or racial/ethnic minority.
  - Setting a quota for a specific number of individuals to be hired based on a protected class characteristic.
- Other high-risk activities include:
  - Allowing employees with hiring decision-making power to have access to demographic information.
  - Tying in compensation with certain diversity hiring targets.
  - Publishing or creating aspirational goals for workforce diversity.

# Key Takeaways

- This is a rapidly developing area of law. We expect continued guidance and clarification in the coming months.
- Employers may still provide and support legal programs and activities within their organization. Employers need to be mindful of how they develop, operate and maintain these programs to avoid unwanted regulatory scrutiny.
- Federal contractors must discontinue federal affirmative action programs for women and minorities and coordinate with their federal contracting officers regarding FAR compliance.
- All employers should continue to ensure that all employment decisions and opportunities are merit-based and not based on protected characteristics.

# Pregnant Workers Fairness Act (PWFA)

# Pregnant Workers Fairness Act (PWFA)

- Effective June 2023 (regs effective June 2024)
- Requires reasonable accommodations to limitations related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions, unless the accommodation will cause undue hardship to employer
- Game changer for HR
- Training is a “must do”

# Pregnant Workers Fairness Act (PWFA)

- Imposes far greater obligations and limitations on employers than those imposed by the ADA, including:
  - Limiting when and how much medical information can be obtained
  - Requiring elimination of some essential job functions
  - Deeming certain accommodations per se reasonable and required absent extenuating circumstances
  - Adding nursing during work hours as a reasonable accommodation
- Requires different processes and forms than ADA/FMLA

# Covered Conditions and Limitations

Pregnancy, childbirth, or related medical conditions that may be entitled to reasonable accommodation include a wide range of conditions, including but not limited to:

- Current or past pregnancy
- Postpartum depression
- Gestational diabetes, endometria, changes in hormone levels, lactation, high blood pressure, incontinence
- Pre-existing conditions exacerbated by pregnancy or childbirth
- Potential or intended pregnancy (including infertility, fertility treatments or use of contraception)\*
- Labor, delivery, miscarriage, abortion\*\*

## Covered Conditions and Limitations (cont.)

Limitations related to pregnancy, childbirth or related medical conditions can be “modest, minor, and/or episodic, and do[] not need to meet the definition of disability” under the ADA.

- No severity threshold for coverage
- Limitations can be problems such as:
  - Migraines or morning sickness
  - Inability to be around certain chemicals, work in the heat, perform certain physical tasks
  - Need to attend health care appointments for the pregnancy, childbirth, or related medical condition itself
  - Limitations simply to help maintain the individual’s health and ability to work

# Documentation Prohibitions

Documentation cannot be required in the following situations:

- The limitation and needed accommodation are obvious and the individual provides “self-confirmation.”
- The employer has sufficient information to determine whether the limitation exists and the accommodation is needed.
- The individual is pregnant and the accommodation is a “predictable assessment.”
- The accommodation is related to time/place to pump or nurse during work hours and the employee provides “self-confirmation.”
- The accommodation is available to employees without known PWFA limitations without submitting supporting documentation.

# What Reasonable Accommodation May Be Required?

*Examples include but not limited to:*

- Temporary suspension of one or more essential job duties
- Light duty or help with lifting or physical tasks
- Temporary reassignment to another job
- Modified work schedule, such as having shorter hours, part-time work, or a later start time
- Additional, longer, or more flexible breaks to drink water, eat, rest or use the restroom
- Changing food or drink policies to allow for a water bottle or food
- Changing equipment, devices, or workstations, such as providing a stool to sit on, or a way to do work while standing
- Changing a uniform or dress code or providing safety equipment that fits
- Reserved parking
- Work from home
- Leave for health care appointments
- Leave to recover from childbirth or other medical conditions related to pregnancy or childbirth
- Lactation accommodations that exceed those required by the PUMP Act, including space for pumping in proximity to a sink, running water, refrigeration for storing milk, and nursing during working hours when the employee and child are in close proximity (work from home or on-site daycare)

# Predictable Assessments

4 predictable assessments that will not cause an undue hardship in virtually all cases:

- Allowing the employee to have or carry water nearby to drink, as needed
- Allowing the employee to take breaks to eat or drink, as needed
- Allowing additional restroom breaks, as needed
- Allowing the employee to sit or stand, as needed

Employer's delay in providing a predictable assessment accommodation "will virtually always result in a finding of unnecessary delay" and violate the PWFA

***REMEMBER: NO supporting documentation can be required for these requests!***

# Final Compliance Tips

- Do not use ADA or FMLA documentation forms in handling pregnancy-related accommodation requests.
- The PWFA regulations and interpretive guidance is THE playbook. Download it, read it, consult it frequently.
- Train all supervisors and leads on how to spot accommodation requests, especially for predictable assessments, and how to respond to them in compliance with the PWFA.

# Union/NLRB Activity

## Union / NLRB Activity

- Gen Z to Boomers want a voice at work
- Favorable views of unions increasing / unfavorable views decreasing
- Activity is increasing (even in least unionized states)
  - NC - traditionally one of the least unionized, but gains in last 4 years

# What is the law?

- National Labor Relations Act (NLRA)
  - Protects non-supervisor employees in the right to organize, join a union, bargain collectively, and to engage in other concerted protected activities (Section 7 rights)
  - Defines what is lawful and unlawful conduct for employees, unions, and employers

**They are NOT just rights for  
unionized employees**

## Union / NLRB Activity

- Even if not unionized, NLRA protects non-management, non-supervisory employees' rights to engage in “protected, concerted activities”
- No adverse employment action against employees for engaging in protected concerted activities
- May lead to “unfair labor practice” charges with NLRB

## Section 7 Rights: Protected Concerted Activities

- Sign a union authorization card
- Say they want a union
- Attend union meetings
- Wear union buttons, stickers, or T-shirts
- Post on social media about terms and conditions of employment
- Discuss (and complain about) wages, hours, benefits, or other working conditions
- Discuss the benefits of a union during work time (if other nonwork-related subjects are permissible)
- Refuse to work in unsafe conditions
- Engage in a lawful strike

# Social Media Postings

- Employee social media posts about wages, hours, and other terms and conditions of employment ARE typically protected

**“Bob is such a NASTY MOTHER  
F\*CKER don’t know how to talk to  
people!!!!!! F\*ck his mother and  
his entire f\*cking family!!!! What a  
LOSER!!!! Vote YES for the  
UNION!!!!!!”**

# Protected?

## Union / NLRB Activity

- NLRB “frozen” at moment, but expect to see an employer-friendly shift in NLRB positions in time

# Questions?



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